Supreme Court, U.S.
FILED
MAR 16 2007
OFFICE OF THE CLERK

(27)

No. 06-480

IN THE

Supreme Court of the United States

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,
Petitioner,

v.

PSKS, INC., doing business as Kay's Kloset . . .
Kay's Shoes,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

TYLER A. BAKER
FENWICK & WEST, LLP
Silicon Valley Center
801 California Street
Mountain View, CA 94041
(650) 335-7624

THEODORE B. OLSON
Counsel of Record
MICHAEL L. DENGER
JOSHUA LIPTON
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

[Additional Counsel Listed on Inside Cover]

JEFFREY S. LEVINGER
CARRINGTON, COLEMAN,
SLOMAN & BLUMENTHAL, LLP
901 Main Street
Suite 5500
Dallas, TX 75202
(214) 855-3000

GARY FREEDMAN
LAW OFFICES OF GARY FREEDMAN
1149 3rd Street, Suite 200
Santa Monica, CA 90403
(310) 576-2444

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

I. PSKS IGNORES THE CORE PRINCIPLES OF *SYLVANIA*, *SHARP*, AND *KHAN* 1

II. THERE IS A CONSENSUS AMONG ECONOMISTS THAT RESALE PRICE MAINTENANCE CAN HAVE SUBSTANTIAL PROCOMPETITIVE EFFECTS 6

III. THE OTHER ARGUMENTS ADVANCED BY PSKS DO NOT SUPPORT RETAINING THE *PER SE* RULE OF *DR. MILES* 9

A. *Stare Decisis* And Supposed Congressional Acquiescence Do Not Support Retaining The Outdated Rule of *Dr. Miles* 10

B. PSKS's Unsubstantiated Speculation About The Consequences Of Rule-Of-Reason Treatment Does Not Support Retaining The Rule Of *Dr. Miles* 13

IV. PSKS'S ARGUMENT ABOUT A PURPORTED HORIZONTAL CARTEL SHOULD BE REJECTED 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979) 2

Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988) 1, 3, 4, 9, 10, 11, 15, 16

Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) 1, 2, 3, 5, 10, 14, 15, 16, 18

FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986) 3

Ill. Corporate Travel, Inc. v. Am. Airlines, Inc., 889 F.2d 751 (7th Cir. 1989) 20

Nat'l Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978) 3

R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!, 462 F.3d 690 (7th Cir. 2006) 20

State Oil Co. v. Khan, 522 U.S. 3 (1997) 1, 2, 3, 10, 11

Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1983) 12

United States v. Craft, 535 U.S. 274 (2002) 13

United States v. Williams, 504 U.S. 36 (1992) 19

OTHER AUTHORITIES

AMC Working Group Mem. (Dec. 21, 2004), *at* http://www.amc.gov/pdf/meetings/Single-FirmConduct.pdf 12

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2004) 14

Robert H. Bork, *The Antitrust Paradox* (1978) 14

David W. Boyd, *From "Mom & Pop" to Wal-Mart: The Impact of the Consumer Goods Pricing Act of 1975 on the Retail Sector in the United States*, 31 J. Econ. Issues 223 (1997) 17

William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 Harv. L. Rev. 983 (1985) 7

FTC, Analysis to Aid Public Comment (2000), *at* http://www.ftc.gov/os/2000/05/mapanalysis.htm 15

Interview with FTC Commissioner Pamela Jones Harbour, The Antitrust Source, Mar. 2006, *at* http://www.ftc.gov/speeches/harbour/060215HarbourIntrvwC.pdf 7

Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J.L. & Econ. 263 (1991) 8

Pauline M. Ippolito & Thomas R. Overstreet, Jr., *Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case Against the Corning Glass Works*, 39 J.L. & Econ. 285 (1996) 8

Howard P. Marvel & Stephen McCafferty, *The Political Economy of Resale Price Maintenance*, 94 J. Pol. Econ. 1074 (1986) 4

Thomas R. Overstreet, Jr., Bureau of Econ., FTC, *Resale Price Maintenance: Economic Theories and Empirical Evidence* (1983) 8

Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing*, 71 Geo. L.J. 1487 (1983) 7

Richard A. Posner, *Antitrust Law* (2d ed. 2001) 12

Robert L. Steiner, *The Evolution and Applications of Dual-Stage Thinking*, 49 Antitrust Bull. 877 (2004) 7

REPLY BRIEF FOR PETITIONER

Nothing in PSKS's brief diminishes the stark contrast between *Dr. Miles*' antiquated *per se* rule against resale price maintenance and this Court's modern antitrust jurisprudence, which recognizes that *per se* treatment is appropriate only when "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). PSKS never comes to terms with this Court's approach to vertical distribution agreements—particularly the Court's recognition that *per se* analysis is ill-suited to vertical restrictions "because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition." *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 (1977). PSKS instead proposes novel standards for evaluating such arrangements, including its remarkable assertion that "[a]ny conduct that is designed to . . . raise consumer prices is antithetical to the Sherman Act" and should therefore be *per se* unlawful. Resp. Br. 23. This Court has never endorsed the positions that PSKS urges. Indeed, adopting PSKS's arguments would require the Court to abandon several of the core principles underlying modern vertical restraints cases, an approach that is foreclosed by this Court's recognition that "rules in this area should be formulated with a view towards protecting the doctrine of *GTE Sylvania*." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988).

I. PSKS IGNORES THE CORE PRINCIPLES OF *SYLVANIA*, *SHARP*, AND *KHAN*.

A. Over the past thirty years, this Court has repeatedly held that *per se* rules are appropriate only for "conduct that would always or almost always tend to restrict competition and decrease output." *Sharp*, 485 U.S. at 723 (internal quotation marks omitted); *see also Sylvania*, 433 U.S. at 49-50;

Khan, 522 U.S. at 10; *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20 (1979). The Court has explained that "the 'rule of reason' [is] the prevailing standard of analysis," *Sylvania*, 433 U.S. at 49, and that a "departure from the rule-of-reason standard must be based upon demonstrable economic effect," *id.* at 58-59. PSKS does not even attempt to meet that standard. Nor could it. As discussed below, economists and legal scholars have overwhelmingly concluded that resale price maintenance can be used for procompetitive purposes and that there are many situations in which the practice is unlikely to lead to anti-competitive effects.

Instead of attempting to meet the Court's requirement for *per se* illegality that resale price maintenance be almost invariably anticompetitive, PSKS argues that the practice "may" have anticompetitive effects in some circumstances and that Leegin has not come forward with enough "empirical" proof of procompetitive effects to justify rule-of-reason treatment. Resp. Br. 6, 23. But that speculation does not begin to support retaining a *per se* rule. In its decisions overturning *per se* rules, this Court has not required "empirical" proof of procompetitive effects or proof that a practice is *always* procompetitive. Instead, the Court has focused on considerations such as whether "there is substantial scholarly and judicial authority supporting [the] economic utility" of a practice. *Sylvania*, 433 U.S. at 57-58; *see also id.* at 54-55 ("Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers."); *Khan*, 522 U.S. at 15 (relying on "a considerable body of scholarship discussing the effects of vertical restraints"). Those same considerations require overturning the rule of *Dr. Miles*.

PSKS further argues, without citation, that "economic analysis lacks the tools and sophistication to identify" the benefits of resale price maintenance "in a particular situation or to assess whether they offset the attendant adverse ef-

fects." Resp. Br. 28. The lower courts' experience applying the rule of reason to vertical nonprice agreements since *Sylvania* casts serious doubt on this proposition. *See* Pet. Br. 36-39. But even if PSKS were correct, that would not be a justification for retaining a *per se* rule. If it is unclear in a particular situation whether a vertical restraint has net procompetitive or anticompetitive effects, a *per se* rule cannot apply. In fact, a *per se* rule is appropriate *only* where the economic impact of the challenged practice is "immediately obvious." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986); *see also Nat'l Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 692 (1978). Resale price maintenance does not satisfy this condition.

B. PSKS is mistaken in asserting that "the primary antitrust policy objective" is "lowering prices for consumers." Resp. Br. 5. This Court stated otherwise in *Sylvania*, where it made clear that "[i]nterbrand competition . . . is the primary concern of antitrust law." 433 U.S. at 52 n.19; *see also Khan*, 522 U.S. at 15 ("Our analysis is . . . guided by our general view that the primary purpose of the antitrust laws is to protect *inter*brand competition." (emphasis added)); *Sharp*, 485 U.S. at 726 (same). Based on its erroneous view of the "primary antitrust policy objective," PSKS argues that "[a]ny conduct that is designed to, and which has been proven in action to, raise consumer prices is antithetical to the Sherman Act." Resp. Br. 23. PSKS cites no authority for this proposition, which this Court has never adopted.[1]

---

[1] The *amici* States also argue that "higher prices are themselves" an anticompetitive effect (States Br. 6), but the States took precisely the opposite approach in *Khan*, arguing that "[c]onsumers in some cases may be better served by retailers that charge higher prices" because "higher prices may be preferred where better service is bundled with the product." Br. of *Amici* States at 14-15 & n.14, *Khan* (No. 96-871). The only consistency is that the *amici* States prefer *per se* rules because they are relieved of the need to meet their burden to prove anticompetitive effects.

There are, of course, other dimensions to competition than retail prices. Indeed, there are numerous actions that can raise consumer prices while enhancing competition and consumer welfare. For example, manufacturers that advertise their products or upgrade product qualities incur costs that are passed through to consumers in the form of higher prices, yet there is no reason to believe these actions are uniformly "antithetical to the Sherman Act." Indeed, this Court specifically recognized in *Sharp* that vertical distribution restraints can raise retail prices while also fostering interbrand competition and enhancing consumer welfare:

> [A]ll vertical restraints, including the exclusive territory agreement held not to be *per se* illegal in *GTE Sylvania*, have the potential to allow dealers to increase "prices" and can be characterized as intended to achieve just that. In fact, vertical nonprice restraints only accomplish the benefits identified in *GTE Sylvania* because they reduce intrabrand price competition to the point where the dealer's profit margin permits provision of the desired services.

485 U.S. at 728. Accordingly, even though *Sharp* involved "an agreement between a manufacturer and a dealer to terminate a 'price cutter'" that was designed to affect prices, the Court held that the conduct should be evaluated under the rule of reason because it had the potential to enhance interbrand competition. *Id.* at 725-26. Clearly, a vertical distribution restraint cannot be condemned merely because it raises consumer prices. The critical question is the effect of the arrangement on overall interbrand competition.[2]

---

[2] PSKS is also incorrect in arguing that resale price maintenance invariably leads to higher retail prices. *See* Pet. Br. 17 n.7. The pricing studies on which PSKS relies have been criticized as being "very misleading as to the effects of changes in the legal status of RPM." Howard P. Marvel & Stephen McCafferty, *The Political Economy of Resale Price Maintenance*, 94 J. Pol. Econ. 1074, 1094 (1986). Moreover, none of the

C. PSKS and its *amici* similarly disregard the principles underlying *Sylvania* and *Sharp* by focusing solely on the reduction of intrabrand competition resulting from resale price maintenance agreements, while ignoring any countervailing positive effects on interbrand competition. *See, e.g.*, Resp. Br. 6 ("The only uniform and demonstrable effect of RPM is higher consumer prices."); States Br. 6. Contrary to PSKS's approach, this Court explained in *Sylvania* that "[t]he market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition." 433 U.S. at 51; *see also id.* at 54-55 ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."). In light of this complexity of impact and the potential for countervailing impacts on intra- and interbrand competition, the Court concluded that the vertical restraints at issue should be evaluated under the rule of reason. *Id.* at 58.

PSKS fails to address the well-recognized positive effects on interbrand competition that can motivate manufacturers to implement vertical arrangements. In particular, PSKS never explains why a manufacturer might take actions that expand its retailers' margins, unless it expects to achieve some benefit in the promotion of its product against its interbrand rivals. Clearly, manufacturers have no interest in enriching their retailers if there are no such countervailing benefits. *See, e.g., Sylvania*, 433 U.S. at 56 ("manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products"); Br. of Economists 5. The benefits to inter-

---

[Footnote continued from previous page]

pricing studies cited by PSKS measures the level of services provided in connection with price-maintained products, the impact of resale price maintenance on demand for those products, or the entry-enhancing properties of using resale price maintenance.

brand competition that prompt manufacturers to institute vertical nonprice agreements—which this Court identified in *Sylvania* and *Sharp* as supporting rule-of-reason treatment—are the same benefits that motivate manufacturers to institute resale price maintenance arrangements. *Sylvania* and *Sharp* foreclose PSKS's attempt to disregard these benefits by focusing solely on the effects of resale price maintenance on the price component of intrabrand competition.

II. THERE IS A CONSENSUS AMONG ECONOMISTS THAT RESALE PRICE MAINTENANCE CAN HAVE SUBSTANTIAL PROCOMPETITIVE EFFECTS.

It is beyond serious debate in the economic community that resale price maintenance can have positive effects on interbrand competition and can yield substantial benefits for consumers. The Court need look no further than the *amicus curiae* brief submitted by 23 of the Nation's leading antitrust economists. The *amici* economists explain that "the incentives facing retailers may be out of alignment with those of manufacturers, to the detriment of the manufacturers' ability to compete effectively with the products of competing manufacturers," and they describe how "RPM can help to align these incentives and enhance the competitiveness of a manufacturer's product, thereby benefiting consumers." Br. of Economists 5-11. The economists explain that "even where minimum RPM raises the price charged by a given retailer, that does not mean that there is necessarily an anticompetitive effect." *Id.* at 12.

The *amici* economists further point out that "it is essentially undisputed that minimum RPM can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects." *Id.* at 16. While there is a disagreement in the literature with respect to the relative frequency with which resale price maintenance can have procompetitive or anticompetitive effects, "[t]he posi-

tion absent from the literature is that minimum RPM is most often, much less almost invariably, anticompetitive. Thus, the economics literature provides *no* support for the application of a *per se* rule." *Id.* (emphasis added). The views of the *amici* economists are consistent with the economic and legal literature, which is replete with articles and texts that describe the procompetitive effects of resale price maintenance and recommend rule-of-reason treatment. *See* Pet. Br. 13 n.4; Br. of CTIA—The Wireless Association 7-8.

Neither PSKS nor its *amici* cites a single article or economic commentary that expresses doubt about the existence of procompetitive uses of resale price maintenance. Indeed, even the commentators who express the greatest concern about potential anticompetitive uses of resale price maintenance acknowledge that the practice can be used for procompetitive purposes in a number of situations.[3]

---

[3] *See, e.g.*, Robert L. Steiner, *The Evolution and Applications of Dual-Stage Thinking*, 49 Antitrust Bull. 877, 899 (2004) (arguing that "antitrust intervention against firms that have adopted vertical price or distribution restraints must be confined to brands that enjoy a very strong consumer franchise"); William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 Harv. L. Rev. 983, 1001-02 (1985) ("[I]n the case of new products or products of new entrants into the market, vertical restraints . . . should be permissible, or at least should be treated more leniently in [a] . . . rule of reason analysis."); *Interview with FTC Commissioner Pamela Jones Harbour*, The Antitrust Source, Mar. 2006, at 3, *at* http://www.ftc.gov/speeches/harbour/060215HarbourIntrvwC.pdf ("We know that vertical restraints may be procompetitive or anticompetitive, and this depends on numerous factors. It also depends on a complex analysis of interrelationships and incentives among various distribution channel participants."); Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing*, 71 Geo. L.J. 1487, 1495 (1983) (suggesting that there should be "exceptions to a *per se* rule" or a "'characterization' step" in which a court determines whether to apply the rule of reason or a *per se* rule based on the circumstances of a given case).

Faced with this mountain of scholarship, PSKS and its *amici* label the economic literature "speculation" and argue that there is not enough "real-world evidence" or "empirical support for the belief that minimum RPM has procompetitive effects." Resp. Br. 24; States Br. 11. The economic community, however, does not share PSKS's skepticism toward the procompetitive potential of resale price maintenance. Br. of Economists 4-11. Nor did this Court insist on the empirical evidence that PSKS demands when it considered the effects of vertical territorial restraints in *Sylvania*.[4]

Moreover, there are, in fact, empirical analyses that support the conclusion that manufacturers can and do use resale price maintenance for procompetitive purposes.[5] Similarly, there are a number of "real world" case studies that describe the procompetitive uses of resale price maintenance and the anticompetitive effects of the government's efforts to prosecute the practice.[6] In addition, the *amicus curiae* brief submitted by PING, Inc., provides a striking illustration of the potential procompetitive effects of resale price maintenance

---

[4] *Cf.* Pet. Br. at 26, *Sylvania* (No. 76-15) (criticizing as "speculative" the argument that the elimination of intrabrand competition can stimulate interbrand competition, and arguing that "it is impossible to tell whether conceded elimination of intrabrand competition in fact has off-setting pro-competitive interbrand effects").

[5] *See, e.g.*, Thomas R. Overstreet, Jr., Bureau of Econ., FTC, *Resale Price Maintenance: Economic Theories and Empirical Evidence* 163 (1983) (economic theory "suggests that RPM can have diverse effects, and the empirical evidence suggests that, in fact, RPM has been used . . . in both socially desirable and undesirable ways"); Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J.L. & Econ. 263, 292 (1991).

[6] *See, e.g.*, Pauline M. Ippolito & Thomas R. Overstreet, Jr., *Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case Against the Corning Glass Works*, 39 J.L. & Econ. 285 (1996); Overstreet, *supra*, at 119-29 (summarizing a number of case studies).

and the substantial anticompetitive effects of continued *per se* condemnation of the practice.[7]

There would likely be even more empirical studies analyzing the procompetitive effects of resale price maintenance, but "real world" examples are difficult to identify because the practice has been subject to an inflexible *per se* prohibition throughout the period in which modern economic analysis of the practice has developed. For example, in this case Leegin attempted to introduce "real world" evidence of the procompetitive purposes and effects of its use of resale price maintenance, including the report of Professor Kenneth Elzinga, but PSKS successfully sought the exclusion of such evidence. Moreover, even if there were a genuine dispute about whether resale price maintenance can have procompetitive effects or the frequency or strength of such effects, that is not a reason to retain a rule that presumes the practice to be anticompetitive without any examination of its actual effect. *See Sharp*, 485 U.S. at 723 ("*per se* rules are appropriate only for conduct that is manifestly anticompetitive").

III. THE OTHER ARGUMENTS ADVANCED BY PSKS DO NOT SUPPORT RETAINING THE *PER SE* RULE OF *DR. MILES*.

Failing to offer a demonstrable economic effect that supports a *per se* rule condemning all uses of resale price maintenance, PSKS offers a handful of alternative arguments for retaining the *per se* rule of *Dr. Miles*. Each of those arguments falls short.

---

[7] PING describes how enforcing minimum resale prices allows it to provide unique products in the competitive marketplace for golf equipment that enhance consumer choice and interbrand competition. *See* PING Br. 9. PING further describes how the rule of *Dr. Miles* has forced it to implement an elaborate, costly, and inefficient program—all to comply with the *Colgate* doctrine and thereby avoid the rigid *per se* rule. *Id.* at 10-11. These costs could be avoided, to the benefit of consumers, if resale price maintenance were evaluated under the rule of reason. *Id.*

A. *Stare Decisis* And Supposed Congressional Acquiescence Do Not Support Retaining The Outdated Rule Of *Dr. Miles*.

1. PSKS asserts that "traditional *stare decisis* principles compel retaining" the rule of *Dr. Miles*. Resp. Br. 7-10. PSKS, however, omits any mention of either the Court's treatment of this issue in *Khan*, in which the Court rejected the same argument that PSKS now raises, or the long line of cases in which this Court has emphasized the dynamic nature of the Sherman Act and the role of the Court in adapting that law to "the lessons of accumulated experience." *Khan*, 522 U.S. at 20; *see also* Pet. Br. 32-33.

The Court has repeatedly recognized that "the term 'restraint of trade,' as used in § 1, . . . 'invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.'" *Khan*, 522 U.S. at 21. "The changing content of the term 'restraint of trade' was well recognized at the time the Sherman Act was enacted." *Sharp*, 485 U.S. at 731.

This Court has never left an outmoded *per se* rule in place based on considerations of *stare decisis*.[8] Indeed, the Court expressly rejected *stare decisis* as a basis to retain the *per se* rules in *Sylvania* and *Khan*. *See Sylvania*, 433 U.S. at 58 n.30; *Khan*, 522 U.S. at 20-21. As the Court explained in *Sharp*, "[i]t would make no sense to create out of the single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstances and

---

[8] Likewise, the Court has never altered the standard for assessing the propriety of a *per se* rule because the rule had already been in place. For example, in *Sylvania* and *Khan*, the Court assessed the *per se* rules under the same standard that the Court had set forth in numerous prior opinions. *See supra* at 1-2. Notably, in *Khan*, the Court rejected the argument of the *amici* States that principles of *stare decisis* required the petitioner to carry a "heavy burden of adducing compelling legal or societal reasons for overturning *Albrecht*." Br. of *Amici* States at 20, *Khan* (No. 96-871).

new wisdom, but a line of *per se* illegality remains forever fixed where it was." 485 U.S. at 732.[9]

2. PSKS insists that Congress has given a "clear endorsement of the *per se* rule against RPM" (Resp. Br. 8), and that Congress has "expressly declared its intent to return to the *Dr. Miles* standard" (*id.* at 12). PSKS cannot, however, point to any legislation that mandates—or "expressly declared"—that a *per se* rule be applied to resale price maintenance. Contrary to PSKS's unsupported assertions, Congress has never passed such legislation.[10]

Congress's repeal of the Miller-Tydings and McGuire Acts does not require that resale price maintenance be treated as *per se* unlawful. The Miller-Tydings and McGuire Acts permitted complete antitrust exemptions for resale price maintenance where it was permitted under state law. Congressional repeal of that exemption manifested disagreement with *per se* legality, not rule-of-reason treatment. "Con-

---

[9] The Court's common-law role in interpreting the phrase "restraint of trade" does not mean that considerations of *stare decisis* have no place at all in interpreting the Sherman Act. For example, PSKS and its *amici* cite cases in which the Court held that *stare decisis* is an important consideration in assessing issues such as antitrust exemptions for certain industries or limitations on the type of remedies that may be sought by particular types of plaintiffs. *See* Resp. Br. 9-10; AAI Br. 5-6. Significantly, however, none of those decisions involved a broadly applicable interpretation of the phrase "restraint of trade." The cases relied upon by PSKS and its *amici* are thus easily distinguished from the present case. *See Khan*, 522 U.S. at 19 (rejecting the respondents' reliance on the baseball exemption cases "because those decisions are clearly inapposite").

[10] PSKS is also incorrect in asserting that the Court has had "numerous opportunities to examine the continuing appropriateness of the" rule of *Dr. Miles*. Resp. Br. 7. To the contrary, the Court did not consider the viability of the rule in *Sylvania*, *Sharp*, *Monsanto*, *Khan*, or any other recent case. To the extent the Court referred to the rule of *Dr. Miles* in any of those cases, it was simply describing the state of the law, not making an advisory ruling that the rule should be preserved in perpetuity.

gress's action in repealing an antitrust immunity for resale price maintenance was not the same thing as outlawing the practice." Richard A. Posner, *Antitrust Law* 189 (2d ed. 2001); *see also* Pet. Br. 34-35. Congress has never legislated on the question whether resale price maintenance should be evaluated under the rule of reason. Nor should it be expected to have done so. It has long been recognized as "unmistakably clear" that Congress's intent in passing the Sherman Act was "to allow courts to develop governing principles of law." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 643 (1983); *see also* Pet. Br. 33-35.

As it did in its opposition to Leegin's petition for a writ of certiorari, PSKS points to a handful of supposed congressional statements or actions that relate to resale price maintenance, but none of these measures requires that resale price maintenance be treated as *per se* unlawful. For example, as discussed in Leegin's opening brief, the appropriations measures in the 1980s in no way limit this Court's mandate to determine what conduct constitutes an unreasonable restraint of trade. *See* Pet. Br. 35.

PSKS argues that "Congress has continued to be active in the area of vertical RPM in more recent years as well," but it curiously follows that statement with a description of a decision of a working group of the Antitrust Modernization Commission ("AMC") not to study the *per se* rule against resale price maintenance. Resp. Br. 15. In discussing the AMC's decision not to study the rule of *Dr. Miles*, PSKS conveniently omits mention of the AMC's explanation that it should "stand aside and let the common law process work." AMC Working Group Mem. 16 (Dec. 21, 2004), *at* http://www.amc.gov/pdf/meetings/Single-FirmConduct.pdf. That reasoning hardly supports PSKS's position here.

PSKS also quotes statements from the 1998 floor debate in connection with the failed Trademark Anticounterfeiting Act, and argues that Congress's failure to pass that statute

indicates that Congress "preserved" the *per se* prohibition against resale price maintenance. Resp. Br. 16. The opinion of one legislator in connection with unsuccessful trademark legislation, however, is obviously not an appropriate ground upon which to rest an interpretation of the Sherman Act. *See, e.g., United States v. Craft*, 535 U.S. 274, 287 (2002) ("failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute'").

B. PSKS's Unsubstantiated Speculation About The Consequences Of Rule-Of-Reason Treatment Does Not Support Retaining The Rule Of *Dr. Miles*.

PSKS and its *amici* offer a parade of horribles that will supposedly befall consumers and competition if the rule of *Dr. Miles* were overturned. Resp. Br. 26-28. These concerns are merely rhetorical theories and misguided predictions, none of which justifies retaining the rule of *Dr. Miles*.

1. PSKS expresses concern that resale price maintenance could be used "to facilitate cartelizing a market." Resp. Br. 25-26. As Leegin has explained, however, situations in which resale price maintenance can even plausibly be used to facilitate a cartel are rare. *See* Pet. Br. 21. Moreover, adopting rule-of-reason treatment for resale price maintenance would not legalize cartels, which would still be subject to the *per se* rules against horizontal collusion, which are aggressively enforced in both civil and criminal proceedings.

PSKS argues that "[t]he inability to meaningfully distinguish between cartels formed by retailers and restrictions imposed by manufacturers was a problem confronted in *Dr. Miles* and it continues today." Resp. Br. 25. As an initial matter, PSKS is incorrect in its characterization of *Dr. Miles*. That decision was not premised on an inability to distinguish between cartels and manufacturer-initiated vertical agreements, but rather the Court's mistaken belief that there is no difference between a horizontal retail cartel and a

manufacturer's distribution restraint. This long-discredited notion simply cannot support retaining the rule of *Dr. Miles*.[11]

Moreover, PSKS offers no basis for retaining a *per se* rule based on a supposed difficulty in differentiating between horizontal cartels and manufacturer-imposed vertical restraints. This Court addressed a similar argument in *Sylvania*, explaining that while "[t]here may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers," any such problems of proof are not "sufficiently great to justify a *per se* rule." 433 U.S. at 58 n.28.

2. PSKS and its *amici* also express concern about non-collusive but anticompetitive uses of resale price maintenance. *See, e.g.*, Resp. Br. 26; AAI Br. 26. Leegin, however, is not urging that all uses of resale price maintenance should be *per se lawful*, but rather that resale price maintenance agreements should be evaluated under the rule of reason. *See* Pet. Br. 5-7. Where resale price maintenance is used for anticompetitive purposes, the practice will continue to be subject to antitrust liability under the rule of reason.

PSKS argues that a retailer might pressure a manufacturer to adopt resale price maintenance to avoid retail competition, and it suggests that the *per se* rule should be retained to guard against such situations. Resp. Br. 26. This Court

---

[11] *See, e.g.*, 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1620d (2d ed. 2004) ("To the extent that *Dr. Miles* rests on the false categorical propositions that resale price maintenance never benefits manufacturers and always has the same effects as an illegal dealer cartel, its ruling is ripe for a reexamination the Supreme Court has never given it."); Robert H. Bork, *The Antitrust Paradox* 298 (1978) ("This field of law can be made clear, internally consistent, and congruent with reality only when we face the fact that the premise laid down in *Dr. Miles*—that the vertical elimination of dealer rivalry has the same effect as a horizontal cartel—is incorrect and must be rejected.").

rejected an analogous concern in *Sharp*, which arose out of pressure by a powerful retailer on a manufacturer to terminate a price-cutting retailer. 485 U.S. at 721. The Court explained that a fear of "dominant retail power . . . does not possibly justify adopting a rule of *per se* illegality. Retail market power is rare, because of the usual presence of interbrand competition and other dealers, and it should therefore not be assumed but rather must be proved." *Id.* at 727 n.2.

One of PSKS's *amici* argues that "the *Sylvania* rule of reason, as applied by the lower courts, has resulted in a rule of *de facto* per se legality for nonprice vertical restraints." AAI Br. 27. This argument is puzzling, at best. If the consequences of anticompetitive uses of vertical restraints are as dire as the AAI suggests, then it should not be difficult to prosecute such uses under the rule of reason. On the other hand, if there really are so few instances in which vertical restraints lead to substantial anticompetitive effects that rule-of-reason treatment approaches a "rule of *de facto* per se legality," then it cannot be the case that a rule of *per se* illegality is appropriate. In any event, the experience of the post-*Sylvania* era clearly demonstrates that vertical restraints cases can be pursued under the rule of reason.[12] There is no basis to suggest that the rule of reason—"the prevailing standard of analysis" under Section 1 of the Sherman Act (*Sylvania*, 433 U.S. at 49)—is somehow inadequate.

3. PSKS further argues that "[o]verturning the rule of *Dr. Miles* would take away the ability of the average consumer to comparison shop for goods." Resp. Br. 19. This argument reflects a fundamental misunderstanding of resale price maintenance agreements.

---

12 For example, the FTC secured consent decrees in an enforcement action against several music companies regarding their vertical cooperative advertising programs, in which the FTC maintained that the vertical pricing policies violated the rule of reason. FTC, Analysis to Aid Public Comment (2000), *at* http://www.ftc.gov/os/2000/05/mapanalysis.htm.

When a manufacturer uses resale price maintenance, consumers who wish to "shop for a better price" (Resp. Br. 18) will still have all of the choices that are driven by interbrand competition. As this Court explained in *Sylvania*, "[t]he degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer. Thus, there may be . . . no intrabrand competition among the distributors of a product produced by a firm in a highly competitive industry." 433 U.S. at 52 n.19. The market for women's fashion accessories, in which Leegin competes, illustrates this principle. Even without intrabrand price competition among distributors of Brighton-brand purses or belts, consumers can shop among numerous other brands based on price, style, quality, service, or any other criteria that may impact consumer choice. *See* Expert Report of Kenneth G. Elzinga at 19-20 (Pet. App. 36a-37a). The choices available to consumers range from the higher-priced brands sold through retailers such as Neiman Marcus and Saks Fifth Avenue, to the lower-priced brands sold through retailers such as Wal-Mart and Target. *Id.* Leegin's use of resale price maintenance clearly has not denied consumers the opportunity to comparison-shop among numerous product options at higher and lower retail prices.

In addition, overturning the rule of *Dr. Miles* will not dampen consumers' ability to "pick a retailer based upon services offered in conjunction with a particular article," as PSKS speculates (Resp. Br. 18). Indeed, manufacturers frequently adopt vertical distribution restraints to foster service competition among the retailers of the manufacturer's product. *See, e.g., Sharp*, 485 U.S. at 728. It is precisely because consumers have the ability to comparison-shop based on services and other nonprice criteria that manufacturers implement such programs. Consumer choice drives retailers to compete through sales-related services and thereby improves the manufacturer's interbrand competitive positioning.

Significantly, resale price maintenance is *less* restrictive of intrabrand competition than territorial restraints, which this Court held to be subject to rule-of-reason treatment in *Sylvania*. While vertical territorial restraints eliminate all intrabrand retail competition, resale price maintenance permits and often encourages nonprice competition among retailers of a brand in the same geographic market. *See* Pet. Br. 30 n.13; Br. of Economists 17. PSKS simply ignores this dimension of intrabrand competition under resale price maintenance arrangements.

4. PSKS argues that resale price maintenance should be *per se* unlawful because "most customers prefer stores offering lower prices over those offering greater services" and resale price maintenance might induce retailers to provide more services than consumers really want. Resp. Br. 27. Similarly, PSKS argues that the prohibition on resale price maintenance is desirable because it fosters "the development of larger discount retailers." *Id.* at 18. That many consumers purchase products through discount channels simply does not justify *per se* condemnation of any vertical restraint, including resale price maintenance. It is not the purpose of the antitrust laws to put a thumb on the scale in favor of "larger discount retailers" and reduce diversity in product distribution by discouraging manufacturers from distributing through retailers that provide more point-of-sale services.[13]

At a fundamental level, PSKS and its *amici* seek to skew the combination of price and nonprice competition in favor of price competition. *See, e.g.*, Resp. Br. 29 ("it is imperative to safeguard practices that result in lower consumer prices").

---

[13] As recognized by an article relied upon by PSKS, the trend in favor of discount retailers may reflect an overall *loss* in consumer welfare because of "the loss of information services engendered by the prohibition of RPM." David W. Boyd, *From "Mom & Pop" to Wal-Mart: The Impact of the Consumer Goods Pricing Act of 1975 on the Retail Sector in the United States*, 31 J. Econ. Issues 223, 231 (1997).

It is not the function of the Sherman Act, however, to regulate a manufacturer's choices as to how to strike a balance between competing on price, service, promotion, or other product characteristics—interbrand competition is a far better regulator of those choices. If consumers want to purchase particular products or brands through discount channels, market forces will prompt manufacturers to adopt practices that support such channels. Antitrust regulation of these choices is unnecessary and undesirable.

5. One of PSKS's *amici* argues that manufacturers have "less restrictive alternatives" to resale price maintenance, such as paying retailers for performing specified services. *See* AAI Br. 21-22. The Court rejected this argument in *Sylvania*, where it explained that "[t]he location restriction used by Sylvania was neither the least nor the most restrictive provision that it could have used." 433 U.S. at 58 n.29. As the Court recognized, prohibiting one method of product promotion will simply result in "a shift to less efficient methods of obtaining the same promotional effects." *Id.* at 56 n.25.[14]

Similarly, the AAI argues that "nonprice vertical restraints are more likely to have procompetitive benefits than RPM." AAI Br. 24. The potential for procompetitive benefits from various vertical arrangements, however, depends on the nature of the product. For example, Leegin was selling varying amounts of its products to approximately 5000 retailers nationwide. It is not practical for a manufacturer to establish exclusive retail territories when it is selling belts

---

[14] The AAI's argument undermines the notion that overturning the rule of *Dr. Miles* would necessarily result in higher retail prices. Whether the manufacturer pays retailers directly to promote its products or shifts the promotional costs to retailers via a guaranteed minimum margin, the cost of promotional efforts is passed through to consumers. Where the manufacturer has the ability to choose the most efficient method of ensuring that its products are adequately promoted, the costs that are passed through to consumers—and, consequently, retail prices—will be lower.

and handbags, as opposed, for example, to earth-moving equipment. Likewise, it is not efficient for a manufacturer to enter into separate contracts with each of thousands of retailers to specify all of the tasks that each retailer should perform to promote the manufacturer's belts and handbags. In these circumstances, resale price maintenance may well be the most efficient method to achieve procompetitive benefits.

IV. PSKS'S ARGUMENT ABOUT A PURPORTED HORIZONTAL CARTEL SHOULD BE REJECTED.

PSKS argues that Leegin's vertical pricing policy should be viewed as a *per se* unlawful horizontal agreement because Leegin owns approximately 70 retail outlets among the approximately 5000 retail stores that sell Leegin's products. Resp. Br. 29-31. Based on this dual-distribution approach, PSKS argues that the verdict below should be affirmed. *Id.* The Court considered and rejected this argument in granting Leegin's petition for a writ of certiorari, and PSKS offers no basis to support a different outcome now. *See United States v. Williams*, 504 U.S. 36, 40 (1992).

Moreover, PSKS never raised this argument below. Prior to its opposition to Leegin's petition for a writ of certiorari, PSKS never argued that *per se* treatment is appropriate for any reason other than *Dr. Miles*' *per se* prohibition on vertical resale price maintenance.[15] The courts below never addressed PSKS's eleventh-hour horizontal theory, but rather

---

[15] For example, in seeking to exclude the testimony of Professor Elzinga, PSKS argued to the district court: "[A]greements fixing the minimum retail price of goods are per se illegal. Because it does not matter whether the agreement arose out of a horizontal combination, Elzinga's opinions are not relevant. . . . In this case, Leegin conspired with its dealers to establish a minimum resale price for Leegin's products . . . . Such actions are vertical price restraints and, thus, amount to *per se* violations of the Sherman Act." PSKS Mot. to Limit the Testimony of Kenneth G. Elzinga 4 (Mar. 5, 2004, Dist. Ct. Docket Entry 42).

based their holdings on the rule of *Dr. Miles*. *See* Reply Br. in Support of Pet. for Writ of Cert. 2 n.1.

There is nothing novel or pernicious about a restraint on intrabrand retail competition established by a dual-distributing manufacturer. This Court and numerous lower courts have rejected attempts to characterize such arrangements as *per se* unlawful horizontal agreements. *See id.* at 3 n.2. Leegin has no incentive to organize a cartel among its retailers, as any effort to promote supracompetitive profits for retailers of Leegin's products would simply divert traffic to the numerous other brands sold in countless other outlets and reduce the volume of Leegin's own sales. *See R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 696-97 (7th Cir. 2006). Moreover, competition at the retail level is heightened when a manufacturer establishes its own outlets that compete with its distributors. Accordingly, "[d]ual distribution . . . does not subject to the per se ban a practice that would be lawful if the manufacturer were not selling direct to customers; antitrust laws encourage rather than forbid this extra competition." *Ill. Corporate Travel, Inc. v. Am. Airlines, Inc.*, 889 F.2d 751, 753 (7th Cir. 1989).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
MICHAEL L. DENGER
JOSHUA LIPTON
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

TYLER A. BAKER
FENWICK & WEST, LLP
Silicon Valley Center
801 California Street
Mountain View, CA 94041
(650) 335-7624

JEFFREY S. LEVINGER
CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, LLP
901 Main Street
Suite 5500
Dallas, TX 75202
(214) 855-3000

GARY FREEDMAN
LAW OFFICES OF GARY FREEDMAN
1149 3rd Street, Suite 200
Santa Monica, CA 90403
(310) 576-2444

Counsel for Petitioner

March 16, 2007